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Medical Examinations—When Required by Law

THE 1957 California legislative session resulted in enactment of Senate Bill 1093 which substantially altered and broadened the discovery procedures in civil litigation. This legislation was modeled primarily upon the discovery rules in effect in the Federal Courts and became effective on January 1, 1958.

These discovery procedures are so new that their full impact has not, as yet, been fully realized by the public and the members of the bar. In some respects, the legislation will affect in one fashion or another the practice of medicine. This article will deal only with a restricted portion of this legislation related to the provisions for physical and mental examinations of people in civil litigation. The pertinent sections of the California Code of Civil Procedure are section 2032, which generally provides for the authority to require submission of a party to physical, mental or blood examination, and section 2034, which provides certain sanctions for failure to comply with an order of court.

Section 2032, in part, provides that, in an action in which the mental or physical condition or the blood relationship of a party is in controversy, the court may order the party to submit to a physical or mental or blood examination by a physician. The order may be made only for good cause shown and shall specify the time, place, manner, conditions and scope of the examination and the person or persons by whom it is to be made. If requested, the party causing the examination to be made shall deliver to the person examined or party to the action a copy of a detailed written report of the examining physician, setting out his findings and conclusions, and if a physician fails or refuses to make such a report, the court may exclude his testimony if offered at the trial. In this connection, it should be noted that in *Jorgensen v. Superior Court*, 163 ACA 589, the

District Court of Appeal of the State of California held that there is no attorney-client privilege which would cloak the report and justify a refusal upon demand to deliver a copy to the other party in the action, or the person examined.

The court further stated that if such reports *were* privileged, that privilege would be waived by virtue of procuring the physician's examination upon which the report is based.

Section 2034 of the California Code of Civil Procedure, in part, provides that, if any party refuses to obey such an order, the court may make an order that the physical or mental or blood condition of the person sought to be examined shall be taken to be established for the purposes of the action in accordance with the claim of the party seeking the examination and an order refusing to allow the disobedient party from introducing evidence of the physical or mental or blood condition of the person sought to be examined. Although the code provides penalties for disobedience of the order, the usual contempt proceedings will also apply.

Prior to the adoption of the code sections, there was no express statute permitting or compelling a physical examination of a party by a physician. However, the courts, in several cases, held that a trial court could compel such examinations under other sections of the Code of Civil Procedure. As a practical matter, the parties often stipulated that such an examination be performed and this custom is still followed by attorneys.

The statute contains several safeguards for the litigants. It requires the party seeking the order for examination to make a motion with proper notice to all other parties and to the person to be examined. This assures a full and open hearing by the court which permits all individuals to present their arguments.

The notice of motion, a formal legal document giving the parties notice of the hearing, must specify the time, place, manner, conditions and scope of the examination and the person or persons by whom it is to be made. Any disagreements on these points can be stated at the hearing before the court.

The court, in the exercise of its power to order the examination would have due regard for the feelings of the person to be examined and the proprieties of the case, to the extent that the ends of justice will permit in any particular legal action.

The physician or surgeon chosen by the litigants or appointed by the court and undertaking to conduct the examination should follow closely the order of the court specifying the place, manner, condition and scope of the examination. (It should be noted, however, that in the majority of cases such examinations will be conducted pursuant to the stipulation

of the parties without the necessity for a court order.)

A physician performing such examinations should also keep in mind the necessity for detailed written reports setting forth his findings and conclusions. The code specifically provides that failure or refusal to make such a report will be sufficient grounds for excluding his testimony at the time of trial. Such a result might destroy the physician's usefulness to the persons requesting the examination.

The examinations performed by a physician are of extreme importance to all of the parties involved in the litigation. It behooves the physician, acting as such in the capacity as examiner for one or the other of the parties, to follow scrupulously the order of the court providing for the examinations and/or the instructions of the attorney requesting said examinations to insure that the examinations accomplish the purpose desired in assisting the court to arrive at a fair determination of the litigation.

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_____, M.D.

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